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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 140

FEDERAL BROADCASTING SYSTEM, INC., *Petitioner*,

v.

AMERICAN BROADCASTING CO. INC., and
MUTUAL BROADCASTING SYSTEM.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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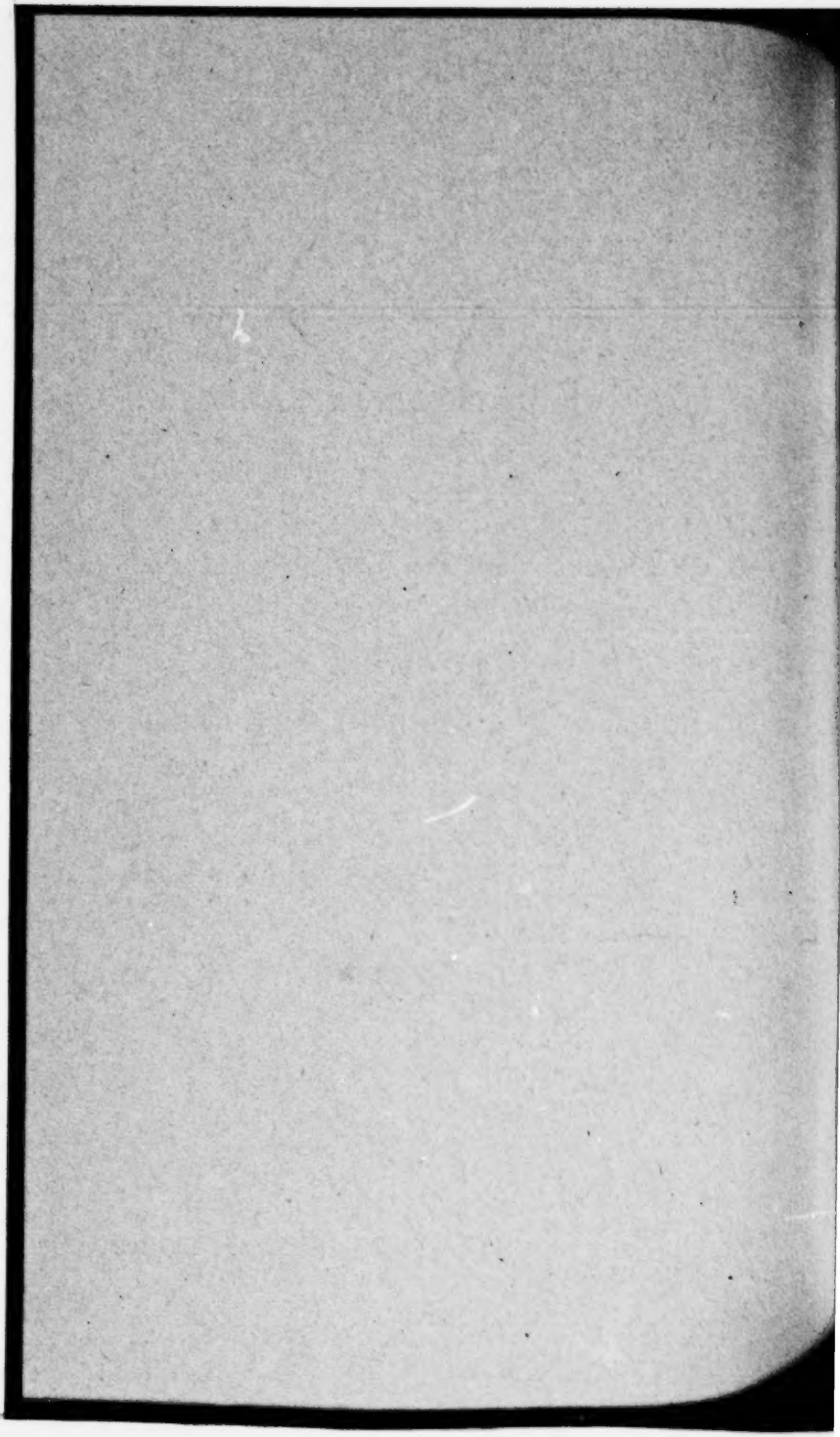

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Petitioner, Federal Broadcasting System, Inc., prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above cause April 8, 1948 (R. 171), which affirmed a judgment of the United States District Court for the Southern District of New York entered on November 12, 1947 (R. 149).

Opinion.

The opinion of the Circuit Court of Appeals (R. 167-171) is reported in 167 F. 2d 349 (1948).

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on April 8, 1948 (R. 171). The jurisdiction of this Court is invoked under Sec. 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

This petition questions the correctness of the decision of the Court below in holding:

(1) That the four existing national radio networks do not violate the Sherman Act by fixing the price which a radio broadcast station licensed by the Federal Communications Commission (hereinafter referred to as FCC) shall charge national advertisers who purchase broadcast time over the station's facilities;

(2) That the four existing national networks do not violate the Sherman Act by engaging in a series of exclusive arrangements which require their respective national advertisers to deal exclusively with their respective affiliated stations with the purpose and effect of excluding unaffiliated stations from all access to the national advertising market;

(3) That the FCC's Chain Broadcasting Regulations as interpreted by this Court in *NBC* v. *United States*, 319 U. S. 190 (1943), sanction the price-fixing and exclusive practices of the networks;

(4) That the uniform participation by the four existing national radio networks, each with knowledge the other is so doing, in a particular system of doing business which has the effect of denying independent radio stations all access to the national advertising market, does not constitute, at least prima facie, a conspiracy in violation of the Sherman Act.

Statutes Involved.

The pertinent statutes are printed in the Appendix, infra, pages 10 and 11.

Statement.

The petitioner is the owner of radio broadcast station WSAY at Rochester, New York, and brought an action against the four existing national chain broadcasting networks, National Broadcasting Company, Columbia Broadcasting System, Inc., Mutual Broadcasting System and American Broadcasting Company, Inc. (hereinafter referred to as NBC, CBS, Mutual, ABC) and two of their officers. It sought treble damages and a permanent injunction against all of them for violation of Sections 1 and 2 of the Sherman Act. It charged that by their concerted action these networks had unlawfully linked together substantially all important broadcasting stations and national advertisers by a series of mutually exclusive contracts and had used their resulting powers to dictate arbitrarily the price at which all broadcasting facilities would be available to national advertisers with the purpose and effect of excluding station WSAY from the national advertising market (R. 168).

For some time prior to the present action the four existing national chain networks furnished programs for the three broadcasting stations then existing in Rochester. NBC and CBS each had one of these stations as an exclusive affiliate; WSAY secured programs under special non-affiliate agreements with the remaining two networks, ABC and Mutual. The arrangement with each of these two networks permitted the petitioner to set the price to be charged advertisers for the use of its facilities and gave the networks a fifteen per cent selling commission. The two networks sought unsuccessfully to obtain a "standard" affiliation contract with the petitioner on terms comparable to those they had with their other affiliated stations. Petitioner refused these offers because they did not give to it the right to negotiate with advertisers the rate to be charged for the use of its station (R. 168).

In May and June, 1947, the FCC authorized two new stations in Rochester, with which ABC and Mutual immediately entered into "standard" network affiliation contracts. Thereupon, both networks on the same day notified WSAY that they would both cut WSAY off from further access to national advertisers then purchasing time over petitioner's station (R. 45, 169). As noted by the Court below, because NBC and CBS had constantly made that part of the national advertising market controlled by them exclusively available to their respective affiliates in Rochester, petitioner's station had been compelled to rely upon ABC and Mutual for access to the national advertising market. The effect, therefore, of ABC and Mutual simultaneously cutting WSAY off from access to that part of the national advertising market controlled by them was automatically to deny WSAY any access whatsoever to the national advertising market, the market which a broadcast station must reach if it is to survive. (R. 46-48)

To prevent ABC and Mutual, pursuant to the alleged conspiracy, from severing WSAY's existing relationships with national advertisers then purchasing time over its facilities, WSAY moved in the District Court for a temporary restraining order and for a preliminary injunction, pendente lite (R. 24-27). The District Court issued a temporary restraining order (R. 28-29), but, upon hearing, denied a preliminary injunction (R. 149). Upon appeal, the Circuit Court affirmed the judgment of the District Court (R. 171).

Specification of Errors to be Urged.

The Circuit Court of Appeals erred:

(1) In holding that the four existing national chain networks have the right to fix the price that independently owned radio broadcast stations may charge national advertisers for broadcast time;

(2) In holding that the four existing national chain networks have the right to exclude unaffiliated stations from all access to the national advertising market;

(3) In holding that the FCC's Chain Broadcasting Regulations sanction the price-fixing and exclusive practices of the national chain networks;

(4) In holding that the common pursuit by the four existing national chain networks, each with knowledge the other is so doing, of a uniform course of dealing which results in the complete exclusion from the national advertising market of unaffiliated stations does not constitute, at least prima facie, a conspiracy in violation of the Sherman Act;

(5) In affirming the judgment of the District Court.

Reasons for Granting the Writ.

This case is predicated upon both the antitrust laws and the Communications Act of 1934 (47 U. S. C. Sec. 313) which makes the antitrust laws specifically applicable to the broadcasting industry and invests the Courts of the United States with jurisdiction to revoke the license of any licensee found guilty of violating those laws. Despite the explicit provisions of the Communications Act, the Circuit Court of Appeals held that the FCC's Chain Broadcasting Regulations had largely immunized the national chain networks from the impact of the ordinarily applicable principles of antitrust law—and this in the face of the fact that the FCC admittedly has no jurisdiction over the networks.

The Record and the Circuit Court's opinion reflect that because NBC and CBS consistently dealt exclusively with their respective Rochester affiliates, petitioner was for many years compelled to seek access to the national advertising market via ABC and Mutual (R. 168). These two networks repeatedly tendered to petitioner a "standard" affiliation contract which uniformly conveyed to the networks the right to fix the price which national advertisers should pay for broadcast time purchased over petitioner's station. In fact, the record reflects that ABC sought to force WSAY to accept a "standard" affiliation contract which contained the following clause (R. 38-42, Ex. 21, p. 2):

> We [ABC] reserve the right to change at any time your network station rate to advertisers from that set forth in the preceding table.

Petitioner persistently declined to permit the networks to dictate its price to advertisers because it believed such surrender of control over its station rate was clearly inconsistent with the policies announced in the FCC's Chain Broadcasting Report where the Commission stated (*NBC* v. *United States*, 319 U. S. 190, 209):

> It is against the public interest for a station licensee to enter into a contract with a network which has the effect of decreasing its ability to compete for national business. We believe that the public interest will best be served and listeners supplied with the best programs if stations bargain freely with national advertisers.

However, as the lower Court's opinion recites, petitioner was finally excluded from access to even that portion of the national advertising market controlled by ABC or Mutual solely because it refused to surrender "the right to fix the rate to be charged an advertiser for the use of its station" (R. 168).

As with price-fixing, so with exclusive dealing practices, the record and the lower Court's opinion reflect equally clearly that the networks' uniformly exclusive arrangements with their respective advertisers and affilated stations deny an unaffiliated station all access to the national advertising market (R. 45-46, 169). The necessary effect of such exclusive practices is that petitioner is precluded from broadcasting even those programs which the networks' exclusive affiliates in Rochester refuse to broadcast and which the advertiser and the listening public desire to have broadcast over WSAY. For example, solely because WSAY was not a "standard" affiliate of ABC, that network refused to permit WSAY to broadcast the Boston Symphony Orchestra program, which was not being heard in Rochester, despite the fact that the advertising sponsor specifically authorized WSAY to broadcast the program (R. 40, 135).

Such exclusive practices, of course, stand in sharp contradistinction to the conclusion of this Court in *NBC* v. *United States*, supra, p. 200, that the effect of such practices "designed to protect the affiliate from the competition of other stations serving the same territory, was to deprive the listening public of many programs that might otherwise be available". Such exclusive practices also exist in the teeth of the conclusion of the FCC in its Chain Broadcasting Report (p. 59) that:

> It is not in the public interest for the listening audience in an area to be deprived of network programs not carried by one station where other stations in that area are ready and willing to broadcast the programs. It is as much against the public interest for a network affiliate to enter into a contractual arrangement which prevents another station from carrying a network program as it would be for it to drown out that program by electrical interference.

The Court below ruled that undisputed proof of uniform action by the networks did not constitute a prima facie showing of concerted action because it concluded that the FCC's Chain Broadcasting Regulations "specifically sanctioned", if they did not require, uniform action by the network (R. 170). However, analysis of the Chain Broadcasting Regulations, as interpreted by this Court in *NBC* v. *United States, supra,* demonstrates that not only did the Chain Broadcasting Regulations not sanction the price fixing or exclusive dealing practices of the networks, but, in fact, were explicitly designed to preclude network indulgence in the very practices complained of by petitioner. To hold, as the Court below did, that the Chain Broadcasting Regulations sanction uniform indulgence by the networks in the practices complained of here is to hold that the Regulations sanction their own circumvention. Even a cursory reading of the FCC's Chain Broadcasting Report and this Court's decision sustaining the validity of the Regulations issued thereunder permits of no doubt that the FCC went

to extreme lengths, in the absence of any jurisdiction over the networks per se, to prevent the networks from controlling the rates which the independently owned licensees should charge advertisers for broadcast time. To deliver into the hands of the four existing national networks the power arbitrarily to dictate the price which all of the independently owned station licensees shall charge national advertisers on the ground that such control is sanctioned by the Chain Broadcasting Regulations is not only to frustrate the purposes sought to be served by those Regulations, but is actually to pervert the Regulations to justify the very practices the Regulations were designed to prevent.

In fact, the Circuit Court's decision goes so far in validating the allegedly unlawful practices of the networks, that even if petitioner could adduce additional evidence of concert action over and above the voluminous documentary proof brought forward in support of its moving papers in the Court below, petitioner still would be denied any relief, *legal or equitable*. The Circuit Court held "these cancellations resulted because plaintiff was unwilling to enter into affiliation agreements as each defendant desired and had a right to require as a condition of its contracting to furnish programs" (R. 170). If, in the face of the plain requirements of the Sherman Act, each network was free through the device of uniformly exclusive affiliation contracts, to acquire exclusive control over that part of the market served by it, obviously all four networks in the aggregate completely exclude any non-affiliated station from any access to the national advertising market. The quality and scope of the exclusion thus practiced upon a non-affiliated station is precisely the same, whether the networks pursue their course of exclusive dealings individually or in concert. The Circuit Court's decision therefore, would bar petitioner proving any special damage, even if its exclusion resulted from concerted action, since, as an unaffiliated station, it would have been excluded in any case.

Thus, as a result of its erroneous view of the scope and function of the Chain Broadcasting Regulations, the Court below not only declined to test the facts at bar against the clearly applicable principles of antitrust law, but it departed sharply from the recent holdings of other Circuits and of this Court in refusing to hold that common participation by the four existing national chain networks, each with knowledge the other was so doing, in a uniform course of dealing which completely excludes unaffiliated stations from the national advertising market does not constitute, at least prima facie, a conspiracy in violation of the Sherman Act. *Goldman Theatres* v. *Loew's, Inc.*, 150 F (2d) 738 (CCA3, 1945); *Bigelow* v. *RKO Radio Pictures*, 150 F (2d) 877 (CCA7, 1945); *American Tobacco* v. *United States*, 147 F (2d) 93 (CCA6, 1944), aff. 328 U. S. 781, 66 S. Ct. 1125 (1946). Under the circumstances, the Circuit Court's decision operates to bar petitioner from any relief under the antitrust laws and to render further protraction of the litigation in the District Court futile.

It is submitted that the Circuit Court's decision does such violence to accepted principles of antitrust law and to the clear meaning and intent of the FCC's Chain Broadcasting Regulations, which purport to regulate the contractual relationships between approximately one thousand radio stations and their respective networks, that an immediate review of that decision by this Court is essential in the public interest embodied in the antitrust laws and the Communications Act of 1934.

Respectfully submitted,

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APPENDIX.

Sherman Anti-Trust Act.

SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * * Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or both said punishments, in the discretion of the court. (15 U. S. C. Sec. 1.)

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (15 U. S. C. Sec. 2.)

Clayton Act.

SEC. 16. Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate a preliminary injunction may issue: * * * (15 U. S. C. Sec. 26.)

Federal Communications Act.

Application of antitrust laws to manufacture, sale, and trade in radio apparatus; revocation of licenses.

All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be applicable to the manufacture and sale of and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications. Whenever in any suit, action, or proceeding, civil or criminal, brought under the provisions of any of said laws or in any proceedings brought to enforce or to review findings and orders of the Federal Trade Commission or other governmental agency in respect of any matters as to which said Commission or other governmental agency is by law authorized to act, any licensee shall be found guilty of the violation of the provisions of such laws or any of them, the court, in addition to the penalties imposed by said laws, may adjudge, order and/or decree that the license of such licensee shall, as of the date the decree or judgment becomes finally effective or as of such other date as the said decree shall fix, be revoked and that all rights under such license shall thereupon cease: *Provided, however,* That such licensee shall have the same right of appeal or review as is provided by law in respect of other decrees and judgments of said court. (47 U. S. C. Sec. 313.)